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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1976.

No.

76-1255

**FRANCIS A. VITELLO,
PETITIONER,**

v.

**CHARLES GAUGHAN,
SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL
INSTITUTION, BRIDGEWATER,
RESPONDENT.**

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

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RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

Francis A. Vitello petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 8, 1976.

Opinions Below.

The opinion of the court of appeals is reported at 544 F. 2d 17, and appended, *infra*, at p. 1a. The opinion of the United States District Court for the District of Massachusetts (Freedman, J.) is reported at 414 F. Supp. 26, and appended, *infra*, at p. 5a.

Jurisdiction.

The judgment of the court of appeals was entered on November 8, 1976, and is reprinted in the Appendix, *infra*, at p. 4a. The original date for filing this petition, February 7, 1977, was extended by order of Mr. Justice BRENNAN to and including March 9, 1977. The Court's jurisdiction to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can habeas corpus relief be refused, consistent with 28 U.S.C. §§ 2241 and 2254, to a state prisoner whose conviction is based on wiretap evidence secured in violation of the Fourth Amendment and the corresponding fundamental safeguards established by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*?¹

¹Title III of the Omnibus Crime Control and Safe Streets Act of 1968 will hereinafter be referred to by its codified sections or generally as the "Act" or "Title III."

2. Are federal courts empowered under *Stone v. Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976), or otherwise, to refuse habeas corpus enforcement of the exclusionary rule prescribed by Congress in Title III?

3. Should *Stone v. Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976), be retroactively applied to vacate a final judgment entered by the district court ruling a wiretap order constitutionally defective under the Fourth Amendment where the State raised no objection to the court's deciding the merits of petitioner's claims?

4. Does the rule in *Davis v. United States*, 417 U.S. 333 (1974), relating to the assertion of nonconstitutional federal rights in proceedings under 28 U.S.C. § 2255, bar exercise of habeas corpus jurisdiction under 28 U.S.C. §§ 2241 and 2254 in actions brought by state prisoners asserting rights guaranteed by the Fourth Amendment and corresponding safeguards established by Title III?

5. If certain incriminating wiretap evidence would not have been intercepted, but for the wiretap's operation for more days than the state court would or might have authorized had it complied with Fourth Amendment and Title III requirements, is a person convicted on the basis of such evidence "prejudiced" sufficiently by the unlawful wiretap to invoke federal habeas corpus jurisdiction to redress violation of his rights?

6. Can this "prejudice" be cured, consistent with the Fourth Amendment and Title III, by the court of appeals' *post hoc* attempt to fill in the "blank" in the wiretap order where the number of operating days should have been specified by presuming conclusively that the period of operating time applied for by the prosecutor — 15 days, the statutory maximum — would have been found "necessary" and granted by the state court?

Constitutional and Statutory Provisions Involved.

The text of the Fourth Amendment and pertinent sections of Title III, of 28 U.S.C. §§ 2241 and 2254, and of M.G.L. c. 272, § 99, are reprinted in the Appendix, *infra*, at pp. 10a-16a.

Statement of the Case.

As a result of certain evidence obtained during the operation of a wiretap installed under a state court order dated May 10, 1972, Francis A. Vitello was indicted and, in April, 1973, convicted for violations of various Massachusetts gaming laws. Prior to trial and thereafter on appeal to the Supreme Judicial Court, petitioner sought to have the wiretap evidence suppressed because nowhere in the wiretap order or otherwise did the state court specify any time period or limits and termination date on the tap's operation. Suppression was denied by both courts, and, having exhausted state remedies, petitioner invoked federal habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254 to vindicate his rights.

A. THE STATUTORY FRAMEWORK.

The statutory structure governing state wiretap orders, and particularly the interplay of federal and state law, should be described at the outset. State wiretapping is precluded by Title III, unless specifically authorized by

separate state legislation. See 18 U.S.C. § 2516(2).² State legislation may impose limits on wiretapping which are more restrictive than those prescribed by Title III.³ Where this occurs, Title III operates to incorporate the more restrictive standards by expressly denying the state court power to issue a wiretap order unless the court has acted and its order is in conformity not only with all federal requirements, but also "with the applicable State statute. . . ." 18 U.S.C. § 2516(2). This scheme is enforced by the suppression rule set forth in § 2515 of the Act.

This statutory framework has important bearing in the present case because the number of days a wiretap may be authorized to operate under Title III has been substantially reduced by Massachusetts legislation. Title III restrains courts from authorizing a wiretap to operate "for any period longer than is necessary," and sets the maximum number of operating days a court may authorize at 30. 18 U.S.C. § 2518(5). The legislative history of Title III reveals that it was in response to "a command of the Constitution" that Congress barred courts from authorizing wiretaps to operate "longer than is necessary" and required this determination of "necessity" to be made according to the particular nature and facts of each case.⁴ After making this determination of the necessary operating days, Title III

²See also S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Adm. News (hereinafter "S. Rep. No. 1097"), p. 2187.

Some states have chosen not to enact wiretap legislation, and consequently their agents are precluded from employing wiretaps in their investigations. See *Halpin v. Superior Court*, 101 Cal. Rptr. 375, 495 P. 2d 1295 (Cal. S. Ct. 1972), cert. den. sub nom. *California v. Halpin*, 409 U.S. 982 (1972).

³See S. Rep. No. 1097, p. 2187. Of course, the state may not undercut Title III by enacting standards which are less restrictive than those prescribed by Congress. *Ibid*.

⁴S. Rep. No. 1097, p. 2190.

directs the court to specify that period of time in the wiretap order. 18 U.S.C. § 2518(4).⁵

In regard to this critical decision of the number of operating days to authorize in a given case, Massachusetts legislation is markedly more restrictive than Title III. Under M.G.L. c. 272, § 99I, the state court must restrict the number of operating days to a period not longer than is "necessary," as Title III requires, but in no event may the court grant more than 15 days. The court is also directed under § 99I to bracket the time period during which the order must be executed, by setting the dates when interception must commence, and a date up to 30 days later when it must cease.⁶ Like Title III, the Massachusetts law requires the state court to specify in the wiretap order both the operating time limit and the period of possible surveillance.

The wiretap order in this case contained no such specification of the number of operating days authorized, or the period when these operating days could be used.⁷ Nor does the record indicate that the state court even considered the

⁵In addition, subsection (5) of § 2518 requires every order to contain the following directions:

"that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

⁶For example, presumably when an extreme case of necessity is shown, a court may authorize the maximum operating time, in a maximum period, *i.e.*, the wiretap may be operated on 15 days during a specified 30-day period. Of course, since these are the maximum periods, it is assumed that both the operating time and the time field of operation would be shorter in the normal case.

⁷In fact it did not contain any of the time limits required by Title III and Massachusetts law. A copy of the order is annexed at p. 17a.

question of how many operating days were necessary and therefore could be authorized. What the state court decided on this question, if anything, is completely unknown. Petitioner maintains that had the state court made and specified this decision in compliance with the requirements of Title III and the state law it incorporates, the wiretap would not have been authorized to operate for the number of days it did and might or would have been shut down before his incriminating conversations were intercepted.

B. THE MAY 10, 1972, WIRETAP APPLICATION.

Application for the wiretap order involved here was made on May 10, 1972, in the Superior Court for Suffolk County by a specially designated assistant district attorney. The application reported that a prior wiretap order had been applied for and granted by the court on April 24, 1972, in connection with the same gaming investigation. Apparently, the wiretap installed under the April 24 order was operated for eight days and intercepted over 300 conversations, many of which concerned gaming violations. Even though the April 24 wiretap was directed against petitioner, none of the intercepted conversations implicated him in criminal activities. Despite this, the May 10 application sought permission to operate the new wiretap against petitioner, as well as the other individuals targeted for the earlier tap. Like the earlier wiretap, the tap for which the May 10 application sought authorization was to be installed on telephones located in a private residence.

The May 10 application requested that the court authorize wiretapping for a period of 15 days, "commencing on the date of installation. . . ." The application contains the assertion that 15 days are "required," but

nowhere does it or the accompanying police affidavit attempt to substantiate this contention.

C. THE MAY 10 WIRETAP ORDER.

Along with the application and police affidavit, the prosecutor prepared and filed a proposed wiretap order on May 10, 1972. At the time it was filed, the proposed order was completely "blank" as to time limits. Most importantly, it did not specify and set any time limit on the number of days the wiretap could operate. Nor did it contain specifications of the dates on which the wiretapping must begin and terminate. None of these "blanks" were filled in by the state court when it reviewed and signed the order later in the day on May 10, 1972. Nothing in the record exists to suggest that the court considered the time limits question or what, if anything, it decided in this regard.

Apparently the wiretap authorized by the May 10 order was operated on at least 12 days, for approximately eight hours a day. Some 2,058 conversations were intercepted, of which only 13 concerned or involved petitioner. A few of those 13 were incriminating and became the principal subject of a suppression motion filed pursuant to 18 U.S.C. § 2518(10)(a).

D. THE SUPPRESSION MOTION.

Under Title III, a defendant "may move [before trial] to suppress" wiretap evidence procured on the basis of a wiretap order "insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii). Pursuant to this provision, petitioner moved to suppress the wiretap evidence secured under the May 10, 1972, order, on the grounds, among others, that the inter-

ceptions were unlawful and the order was insufficient on its face because the number of days the tap could be operated had not been set or specified by the court, and because, in fact, the order contained no time limits. During oral argument in opposition to the motion, the prosecution asserted that the absence of these required time limits in the order was the result of a proofreading failure by the assistant district attorney who drafted the proposed order, who "missed the fact that that had been left out" before it was submitted to the court.⁸ But the prosecution offered no evidence to suggest the court considered how many operating days were "necessary" to the investigation, and, if it did make such a determination, how many operating days it decided were "necessary." Nor did the prosecution offer any explanation for the court's failure to insert the required time limits specifying the number of operating days and the dates on which the wiretapping must commence and on which it must cease. Apparently, the prosecutor viewed the state court as a rubber stamp, for he seems never to have read the order after it issued to ascertain what operating and other time limits had been set by the court. If, on the other hand, he had read the order for the time limits and found none, the prosecutor certainly owed the court and defense an explanation for not immediately calling the order's defects to the court's attention. No such explanation was offered in response to the suppression motion.

The trial court denied petitioner's suppression motion. Despite the fact that Title III and Massachusetts law flatly require the court to decide and specify in the order the number of operating days, the trial court excused the violation on the grounds that it was caused by the prosecutor's

⁸Transcript of proceedings on December 18-19, 1972, p. 150.

inadvertent failure to have "the lines in the [proposed] warrant relating to the [proposed] time limitations . . . typed in . . ." before submission to the issuing court.⁹ Regarding the validity of the order, however, the trial court concluded that it lacked the power to "review, in what is an appellate fashion, the action of another judge of the Court."^{9a}

E. THE DIRECT APPEAL.

On direct appeal the Supreme Judicial Court sustained the May 10 wiretap order.¹⁰ The court appears to have focused exclusively on the failure of the order to specify a "termination date." No mention is made in the Supreme Judicial Court's opinion of the order's chief defect, the failure to specify the number of days on which the wiretap could be operated and the issuing judge's evident failure to make a determination of the operating time period on the basis of "necessity." With regard to the absence of a termination date, the court concluded that this time limit could be supplied by deeming the application's requested termination date (15 days after installation of the tap) to be incorporated in the issued order. The court did not consider it an impediment to such incorporation that the May 10 order neither expressly nor by implication refers to the 15-day request made in the application.

⁹Transcript of proceedings on January 22, 1973, p. 212.

^{9a}*Id.* at 213.

¹⁰The Supreme Judicial Court's opinion is reported at 327 N.E. 2d 819.

F. PETITIONER'S RESORT TO FEDERAL HABEAS CORPUS.

Federal habeas corpus relief was thereafter sought on the grounds that the May 10 order was essentially a general and blank warrant because it specified no time limits. The Commonwealth raised no objection to the power or propriety of the district court's exercising habeas jurisdiction to review petitioner's claim. Rather, the Commonwealth confined itself to the merits, contending that the May 10 order should be read to incorporate the applications' time limits. On April 9, 1976, the district court ruled the May 10 order "constitutionally defective." The court concluded that there was no case or constitutional authority for incorporation where, as here, the applications' time limits are not adopted by reference in or physical attachment to the order.

The First Circuit reversed. Withholding judgment on the merits, the court below sustained the Commonwealth's objections to federal habeas corpus review of petitioner's claim, objections not raised in the district court. The court reasoned that while the absence of time limit specifications in the wiretap order simultaneously violate Fourth Amendment and Title III safeguards, habeas corpus relief was available for neither. A Fourth Amendment attack on the absence of time limits was precluded, according to the court, by this Court's intervening decision in *Stone v. Powell*, ___ U.S. ___, 96 S. Ct. 3037 (1976). Likewise, reliance on Title III was futile, for despite the fact that absence of time limits is a Fourth Amendment violation, the claim is downgraded to "nonconstitutional error" when the Title III suppression remedy is invoked. Such "errors," in the court's estimation, fell within the compass of the rule in *Davis v. United States*, 417 U.S. 333 (1974), and could be redressed in federal habeas corpus proceedings only if suf-

ficient "prejudice" has been suffered. The court concluded that petitioner was not "prejudiced" sufficiently by the order's defect, characterized as a "fail[ure] to contain the 30-day limit required by" 18 U.S.C. § 2518(5) since there was no claim the tap operated beyond that time limit.

Reasons for Granting the Writ.

Of all investigatory techniques, wiretapping poses the greatest threat to constitutional rights of personal privacy.¹¹ The most dangerous feature of this "awesome power," *United States v. Giordano*, 469 F. 2d 522, 528 (4th Cir. 1972), affirmed, 416 U.S. 505 (1974); *United States v. Robinson*, 468 F. 2d 189, 192 (5th Cir. 1972), is the fact that a wiretap operates as an "electronic dragnet," indiscriminately subjecting all conversations to surveillance regardless of their relevance to legitimate objectives of a particular investigation.¹² This knowledge of the special dangers of wiretapping was the force that compelled Congress to enact stringent standards and a maximum suppression sanction in Title III for the purpose of "limiting use of the intercept procedure to 'the most precise and discriminate circumstances'." *United States v. Donovan*, ____ U.S. ____, 97 S. Ct. 658, 673 n. 25 (1976).¹³

¹¹See *Berger v. New York*, 388 U.S. 41, 64 (1967); *United States v. King*, 478 F. 2d 494, 503 (9th Cir. 1973); 114 Cong. Rec. 11598-11599, 14700.

¹²See 114 Cong. Rec. 11599, 14713.

¹³Congress' intent primarily was to discourage and limit police use of "this extraordinary investigative device," *United States v. Giordano*, 416 U.S. 505, 527 (1974), except in very clearly specified and controlled instances. See *United States v. Capra*, 501 F. 2d 267, 276 (2d Cir. 1974); *United States v. Marion*, 535 F. 2d 697, 706 (2d Cir. 1976); *United States v. King*, *supra*, at 503; S. Rep. No. 1097, pp. 2185, 2191.

Based on findings of widespread illegal wiretapping, especially prevalent at state and local levels where controls were few and lacking uniformity,¹⁴ and guided by this Court's application of Fourth Amendment standards to wiretapping in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967),¹⁵ Congress moved decisively in 1968 by enacting Title III to establish meaningful safeguards and remedies for the constitutional rights of those subjected to wiretapping and other forms of electronic surveillance.

Congress designed Title III to serve primarily a preventive rather than remedial role in protecting constitutional rights of privacy. See *United States v. Giordano*, 416 U.S. 505, 523, and n. 12 (1974).¹⁶ Title III achieves this end by clearly delineating the *Berger-Katz* requirements, § 2518, by proscribing wiretaps conducted without prior court authorization, §§ 2511, 2518, by enjoining courts from authorizing any wiretap to operate for longer than is "necessary" and in no event for longer than 30 days (or a lesser period set by state statute), § 2518(5), and by directing courts to specify the time and other particularized limits in the wiretap order, § 2518(4). Obedience to these requirements is compelled mainly through

¹⁴See Statement of Congressional Findings, Pub. L. 90-351, § 801. See Hearings before the Subcommittee on Criminal Laws and Procedures, Sen. Judiciary Committee, 90th Cong., 1st Sess. (1967), p. 75; 114 Cong. Rec. 14713.

¹⁵See *United States v. Donovan*, *supra*, at 668; S. Rep. No. 1097, p. 2153; as Senator McClellan, the principal author and proponent of Title III, stated: "every safeguard, in keeping with what the Supreme Court has said in the most recent cases, would be required [by the Act]. Every constitutional safeguard has been placed in the bill." 114 Cong. Rec. 14469, 14728; see also 114 Cong. Rec. at 14470, 14717.

¹⁶The basic intent of Congress was to prevent unlawful wiretapping through explicit substantive regulations and the deterrent effect of a strictly applied suppression rule. S. Rep. No. 1097, p. 89.

the deterrent effect generated by the suppression rule contained in § 2515 and effectuated by § 2518(10)(a).¹⁷

The decision below substantially undermines Congress' effort to prevent unconstitutional and excessive wiretapping, particularly by state authorities, by eliminating a vital measure of federal habeas power to enforce the suppression rule Title III prescribes as the chief deterrent against wiretap abuses. This decision stands in conflict with the Fourth Amendment standards the Court declared in *Berger* and *Katz*, with the maximum deterrent effect against violation of these standards Congress intended to achieve by Title III's suppression rule, with the habeas corpus jurisdiction Congress has extended for redress of constitutional and federal law violations by state officials, and with the decisions of the Second, Third and District of Columbia Circuits. Because of its important consequences, its conflict with the rulings of other Circuits, and its dubious support, the decision below should be reviewed by this Court.

I. THE DECISION BELOW CONFLICTS WITH THE MANDATE OF CONGRESS AND THIS COURT THAT FEDERAL COURTS HAVE AND MUST EXERCISE HABEAS CORPUS JURISDICTION TO SUPPRESS WIRETAP EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT PURSUANT TO THE SUPPRESSION RULE CONGRESS ENACTED IN TITLE III.

A. *In Specifying No Time Limits, the May 10 Order Constitutes a "General Warrant" Facially Void under the Fourth Amendment.*

In *Berger v. New York, supra*, this Court condemned a wiretap order authorizing 60 days of interception as a

¹⁷See S. Rep. No. 1097, pp. 2185, 2195.

virtual "general warrant" and void on its face under the Fourth Amendment. In *Katz v. United States, supra*, this Court ruled that the Fourth Amendment warrant requirements apply to wiretaps "afford[ing] similar protections" for the privacy of those exposed to electronic surveillance as have been afforded in traditional search and seizure settings. 389 U.S. at 355, quoting from *Berger v. New York, supra*, 388 U.S. at 57. In both cases the constitutional violations were found without regard to whether the subject of surveillance had actually been prejudiced by the actions that rendered the wiretap procedure invalid. Suppression was ordered in *Berger* because of the 60-day authorization, even though incriminating evidence was secured within 14 days. 388 U.S. at 45. In *Katz*, the Court conceded that the wiretap procedure followed by the FBI was entirely constitutional except for the failure to incorporate the agent's self-imposed restraints in a warrant. Failure to obtain a warrant was, the Court ruled, "per se unreasonable under the Fourth Amendment," and the evidence procured by the wiretap must be suppressed. 389 U.S. at 357.

Together, *Berger* and *Katz* create a warrant system geared to the special character and dangers of wiretapping. Two requirements of that system have particular importance in this case: first, time limits on the operation of the wiretap must be set and specified in the warrant or order; and second, these limits must restrict the wiretap so that it affects "no greater invasion of privacy . . . than [is] necessary under the circumstances." *Katz v. United States, supra*, at 355, quoting from *Berger v. New York, supra*, at 57.

Measured by these *Berger-Katz* requirements, the wiretap order in this case amounts to a massive violation of the Fourth Amendment. The order sets and specifies no date

or instructions for early installation and initiation of wiretap interception. It provides no termination date. Most importantly, it sets and specifies no limit on the amount of time the tap can operate. Indeed, the only reference in the order to time limits on the tap's operation is that it

"shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violation . . ." (p. 19a).

And neither the order nor record in any part suggests that the state court even considered the question of how much operating time was "necessary" in this case. The order, in short, is "blank" as to time limits, relegating both the police who must execute it and the courts who must validate the evidence seized under it to the position of having to speculate as to what if any time limits the issuing court actually imposed.

The facial invalidity of the May 10 order is conceded by respondent. But the Commonwealth contends that the order can be resurrected by reading into it the operating time and termination date requested in the May 10 application. That approach simply cannot be reconciled with the terms or purposes of the Fourth Amendment warrant requirement.

The Fourth Amendment, as this Court ruled in *Berger* and *Katz*, requires all particularizations limiting the scope and duration of the wiretap invasion of privacy to be set on the basis of "necessity" and specified in the "warrant." Neither the text of the Amendment nor the Court's opinions suggest exceptions to this rule; certainly there is no sug-

gestion that the various requests and conclusions stated by the prosecution in its application and affidavit can be deemed or presumed to be the court's findings and warrant specifications.

Acceptance of the Commonwealth's position would render the warrant requirement a nullity. A warrant is not a mere formality. Its role is central in the Fourth Amendment scheme, since it serves as the full and final word on when and how a search can be conducted. As the single definitive source of authority, the warrant can be relied on by the police to guide their actions, eliminating guesswork and discretion; it can command respect from those whose privacy is being invaded, representing in writing the detached and deliberative judgment of a magistrate; and it can provide the authoritative response to any claim that evidence was seized unlawfully. See *Katz v. United States*, *supra*, at 357-359.

Respondent's position that the warrant should not be treated as the full and final word by which the legality of the search is to be tested leads in two opposite and equally destructive directions. In one direction the position opens the way to a reign of speculation and doubt as each side marshals extrinsic evidence to supplement or dispute what the issuing court specified in the warrant. The other direction is toward a rule, which appears to have been accepted by the Supreme Judicial Court in this case, that the issuing court is conclusively presumed to have granted whatever operating time the police want. Its premise must be that the issuing court is a "rubber stamp." Such a presumption is plainly unacceptable. Since the court's duty is to limit the operating time to no longer than is necessary, it can hardly be assumed that it would or did find that a police request, here for the maximum time, is presumptively

confined to what is necessary.¹⁸ Following either course undermines the integrity of the warrant and the "procedure of antecedent justification . . . that is central to the Fourth Amendment," *Osborn v. United States*, 385 U.S. 323, 330 (1966), and installs the rule of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." See *Katz v. United States*, *supra*, at 358-359, quoting from *Beck v. Ohio*, 379 U.S. 89, 96, 97 (1964).¹⁹

Moreover, as the district court found, respondent's position that the application's time limits are incorporated by the May 10 order finds no case support. No decision authorizes supplementation of the warrant from an application or affidavit except in circumstances where those documents are expressly incorporated by reference in or by physical attachment to the warrant.²⁰

¹⁸To assume the police request regarding operating time is limited to what is "necessary" is contrary to the reasons prior clearance and warrants are required in the first place. It is in response to the reality that police officials pursuing their quarry cannot be relied on to take a neutral, deliberative stance regarding the needs of their investigation that the Fourth Amendment has been consistently read to require "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963).

¹⁹Another consequence of following either course, one well illustrated in this case, is that there will be strong incentives for the prosecutor and police to treat the court as a rubber stamp. That must have been the attitude of the prosecutor in this case, since he evidently did not even bother to read the order after it was signed to ascertain what limits the court had imposed on the wiretap. Of course, if the prosecutor had read the order, he certainly was obligated to advise the court immediately of its insufficiency.

²⁰See *Moore v. United States*, 461 F. 2d 1236 (D.C. Cir. 1972). That case exemplifies the type of case where the problem of incorporation generally arises; see, e.g., *Commonwealth v. Todisco*, 294 N.E. 2d 860

B. *The Court Below Erred in Holding that Stone v. Powell, — U.S. —, Precludes Federal Courts from Exercising Habeas Jurisdiction to Enforce the Suppression Remedy Congress Enacted in Title III to Redress Wiretap Violations of the Fourth Amendment.*

Stone v. Powell, *supra*, is concerned exclusively with a "judicially created" suppression rule. See 96 S. Ct. at 3046. *Stone* holds that the Fourth Amendment does not require the suppression remedy or its enforcement by federal

(Mass. S.J.C. 1973). Instead of referring to the target premises described in the underlying affidavit, the warrant in such cases attempts to summarize the description, but fails fully to repeat every significant detail. Where this has happened courts have allowed reference to the affidavit, if it is expressly incorporated or physically attached to the warrant when issued. But another basis for incorporation is that the particular aspect of the warrant involved in these cases is only meant to be a summary of the affidavit, not a statement of "any judicial determination" regarding the scope of the search. *Moore v. United States*, *supra*, at 1238. The test for a warrant's sufficiency as to the identity of the premises to be searched is whether "the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1924). Since the portion of the warrant involved is merely descriptive and not judgmental, it is reasonable for the officer who executed the affidavit and will execute the search to consult the affidavit to flesh out the court's summary. Moreover, it is fair for the officer to assume that the court means the place the officer has described in the affidavit since the court has no independent knowledge of the premises and is not likely to approve a search broader in scope than the police seek to undertake.

But, in this case the question is limits on the amount of time a wiretap may operate, not the address or number of the telephone. Setting time limits requires the court to make an independent judgment of how much time is necessary under the circumstances. It is clear that this judgment also requires the court to apply its experience and instincts as a neutral decisionmaker to strike the proper balance between investigatory and privacy interests. Certainly the police cannot look at a warrant that specifies no time limits and reasonably assume that the court necessarily approved the limits requested in the application, especially where the operating time sought by the prosecutor is the maximum amount possible.

habeas corpus. As such the existence of the remedy and the degree of its enforcement are matters of judicial policy. "[W]eighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims," the Court concluded that the additional deterrent effect generated was too small to justify the costs of more exacting enforcement of the Constitution. 96 S. Ct. 3049, 3051.

The Title III suppression rule was created by Congress, not the courts. A short and full response to the decision below is that *Stone* does not and, indeed, could not reverse the policy judgment of Congress. *United States v. Gior-dano*, 416 U.S. 505, 524 (1974). Whether the courts deem habeas enforcement of the Title III suppression rule good or bad policy, the matter is entirely for Congress to decide. Congress' unalterable decision was to harness the vital power of federal habeas corpus to the Title III suppression rule.

Nothing in the language, history or purposes of Title III suggests the contrary. Title III neither contains nor implies any limit on the availability of federal habeas jurisdiction to enforce the statutory suppression remedy. If this had been its intention, Congress surely could and, it must be presumed, would have said so. See *United States v. Kahn*, 415 U.S. 143, 153 (1974).²¹

²¹In fact, several proposed versions of Title II of the Omnibus Crime Control and Safe Streets Act incorporated sections limiting either or both the exclusionary rule and federal habeas jurisdiction to enforce it. See, e.g., 114 Cong. Rec. 11189. Congress enacted certain regulatory measures relating to the judicial exclusionary rule regarding confessions and eye-witness identification. See 18 U.S.C. §§ 3501-3503. It enacted no similar restriction on the Title III exclusionary rule and no restriction on the availability of federal habeas corpus jurisdiction to enforce the Title III or any other suppression rule. Thus, Congress was not without words to express an intention to establish such restrictions. Moreover, in accord with the governing canon of statutory construction requiring "clear and convincing evidence," of a Congressional intention to impose such restrictions, Title III should not be construed "to restrict access to judicial review." *Johnson v. Robinson*, 415 U.S. 361, 373-374 (1974).

Nor does the history of Title III indicate such an intention. What does appear, however, is that Congress was acutely aware of the distinctive threat wiretapping posed to the right of privacy. *United States v. Kalustian*, 529 F. 2d 585, 588 (9th Cir. 1975). The suppression rule embodied in § 2515 was cited continuously throughout the legislative hearings and debates by proponents of Title III as the primary assurance that the safeguards of privacy established by the Act would be scrupulously obeyed. See *Gelbard v. United States*, 408 U.S. 41, 46-51 (1972); S. Rep. No. 1097, p. 2185. In S. Rep. No. 1097, the key legislative report, it was affirmed that there was no intention "to press the scope of the suppression rule beyond present search and seizure law. See *Walder v. United States*." The *Walder* citation plainly reveals Congress' meaning. It makes evident Congress' intention that Title III's suppression rule not afford the defendant "a shield against contradiction," see *Walder v. United States*, 347 U.S. 62, 65 (1954). But it is equally clear that Congress intended that its suppression rule would ensure, as it perceived the judicial rule did, that "the Government cannot make an affirmative use of evidence unlawfully obtained." *Walder v. United States*, *supra*. In serving this role, Congress meant to have its suppression rule enforced by the same measure of judicial power and resources as the judicial suppression rule was receiving under then "present search and seizure law." Under the then "present" law, it was firmly established that federal habeas corpus remedies were available to vindicate the Fourth Amendment rights of state defendants. See *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967); see also *Kaufman v. United States*, 394 U.S. 217, 225 (1969). Enforcement of Fourth Amendment rights by federal habeas corpus remedies was the "present" search and seizure law Congress incorporated

as a component of the suppression rule it created. The maximum deterrent effect such remedies afford was plainly intended by Congress for its suppression rule, which was "designed to protect privacy . . . [and] serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, p. 2185.

Congress' purpose in creating the Title III suppression rule was to compel strict adherence to the safeguards prescribed by the Act, see *United States v. Giordano*, *supra*, by removing any and every incentive to violate them. Congress intended that the Title III suppression rule would exert its deterrent force to the maximum degree. In *Stone v. Powell*, *supra*, this Court cited the fact that the judicial suppression rule applies only in criminal trial settings as telling evidence that the rule was never conceived of as achieving its maximum deterrence potential. But that same type of evidence in regard to the breadth of the Title III suppression rule demonstrates, in contrast to the judicial rule, that the purpose of Congress was to generate a deterrent effect at the maximum level. Thus, while the judicial rule was confined to the criminal trial, Congress' rule extends to all phases of the criminal proceeding from the grand jury to sentencing, and to the correctional process as well, including parole and probation proceedings. While standing to invoke the judicial rule is quite narrow, standing under Title III to suppress extends to any "person aggrieved," including "a person against whom the interception was directed." 18 U.S.C. § 2510. The judicial rule applies only to criminal proceedings; the suppression rule in Title III applies "across the board," to criminal, civil, administrative and legislative proceedings. S. Rep. No. 1097, p. 2185. Also compare *United States v. Calandra*, 414 U.S. 338 (1974), to *Gelbard v. United States*, 408 U.S.

41 (1972). Finally, by contrast to the judicial rule, see *Stone v. Powell*, *supra*, one express purpose of the Title III suppression rule is to "protect the integrity of court and administrative proceedings."²² See *Gelbard v. United States*, *supra*, at 66, compare *United States v. Calandra*, *supra*, at 347-348.

Congress was fully aware of the costs of such a suppression rule, but it was equally aware of the special threats to privacy posed by wiretapping and it was determined to prevent their realization by guaranteeing maximum enforcement of Title III's suppression rule. See *Gelbard v. United States*, *supra*, at 46-51.

C. *The Court Below Erred in Applying Davis v. United States, supra, to Proceedings Instituted by State Prisoners under 28 U.S.C. §§ 2241 and 2254 to Redress Violations of their Constitutional Rights.*

Contrary to the decision below, *Davis v. United States*, *supra*, does not apply to this case. *Davis* is strictly limited to nonconstitutional claims.²³ In this case petitioner asserts fundamental rights guaranteed by the Fourth Amendment. Whatever limits *Davis* may impose in federal habeas corpus cases, they are confined to nonconstitutional errors of law,

²² Statement of Congressional Findings, Pub. L. 90-351, § 801(b).

²³ *Davis* carries forward a distinction between constitutional and nonconstitutional claims which this Court has consistently followed in determining the availability of relief under 28 U.S.C. § 2255. See *Kaufman v. United States*, 394 U.S. 217, 223 (1969); *Sunal v. Large*, 332 U.S. 174, 179 (1947).

and therefore present no barrier to review of petitioner's Fourth Amendment claims on their merits.²⁴

II. ASSUMING ARGUENDO THAT PETITIONER'S CLAIMS OF RIGHT CAN BE RELEGATED TO THE STATUS OF "NONCONSTITUTIONAL ERRORS," THE COURT BELOW INCORRECTLY RULED THAT *DAVIS V. UNITED STATES* CONSTRICTS THE POWER OF FEDERAL COURTS TO REVIEW SUCH CLAIMS UNDER THE JURISDICTION CONFERRED BY 28 U.S.C. § 2254.

In 28 U.S.C. § 2254(a) Congress expressly conferred jurisdiction on federal courts to grant a writ of habeas corpus to persons in custody under state court judgments in violation

²⁴ While petitioner invokes a statutory remedy to vindicate his Fourth Amendment rights, this is no basis for downgrading the substantive right he asserts from one guaranteed by the Constitution to one protected only by statute. In *Davis*, the focus was on the substantive claim and its source in the Constitution or statute. Whatever limit *Davis* imposes in § 2255 proceedings was confined solely to nonconstitutional substantive claims. To hold that invocation of Title III remedies for Fourth Amendment violations has the effect of downgrading the claim of right to nonconstitutional status would mean that *Davis* limits must apply in every case. For if the invocation of a statutory remedy triggers the downgrading of constitutional rights, it follows that such downgrading will occur merely on the request for the statutory remedies provided by 28 U.S.C. § 2255.

While a wiretap order without time limits simultaneously violates Title III, 18 U.S.C. § 2518(4) and (5), and the Fourth Amendment, the character of the right violated is not reduced to "nonconstitutional error" merely because the Fourth Amendment right is repeated in a statutory text. Indeed, Congress acted under the explicit grant of constitutional power under § 5 of the Fourteenth Amendment, see S. Rep. No. 1097, p. 2180, to implement Fourth Amendment restrictions on state use of wiretaps. Cf. *California v. LaRue*, 409 U.S. 109 (1972). Nor is there any evidence in the legislative history of Title III suggesting that Congress, in restating the *Berger-Katz* standards in statutory text, meant to demote their status and qualify their enforcement through federal habeas corpus actions.

of the "laws" as well as the Constitution of the United States. That provision, "express[ing] the choice of Congress how the superior authority of federal law should be asserted," imposes a power and duty on federal courts to "review errors of federal law in state determinations." See *Brown v. Allen*, 344 U.S. 443, 508-510 (1953) (opinion of Mr. Justice Frankfurter). In short, § 2254 invests state prisoners with a right to have their federal claims of right, predicated on the Constitution or federal statute, reviewed by a federal court. Congress has essentially made the federal courts "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Zwickler v. Koota*, 389 U.S. 241, 247 (1967); see also *Kaufman v. United States*, 394 U.S. 217 (1969).

There is nothing in the text or history of § 2254 that says or implies that the federal courts may pick and choose between federal "law" (as opposed to constitutional) claims as to which deserve vindication and which do not based on some standard of "prejudice." Quite appropriate to this case, confronting the *Davis* incursion on § 2254, is Mr. Justice Frankfurter's injunction, issued in a closely analogous § 2254 context:

"Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress. . . . Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction." *Brown v. Allen*, *supra*, at 498-499.

Nor does the *Davis* opinion suggest its application to § 2254. *Davis*, of course, concerned only proceedings for

collateral review under 28 U.S.C. § 2255 of federal court judgments. While § 2254 and § 2255 serve analogous roles, they are fundamentally distinct in one important respect. In a § 2255 proceeding, the petitioner has already had the advantages of a federal trial and generally a federal appellate forum. In § 2254 cases the petitioner has not. Since a central purpose of federal habeas corpus is to provide a meaningful opportunity for review of federal rights in a federal forum,²⁵ it may be reasonable to raise the threshold to such a forum where the federal claims have already been litigated once before in federal courts. Cf. *Fay v. Noia*, 372 U.S. 391, 424 (1963); *Sunal v. Large*, 322 U.S. 174, 178 (1947); and see Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* (1977 Supp.), p. 268. These considerations obviously have no application to a § 2254 proceeding, where, as here, the right to federal review is invoked for the first time.²⁶

²⁵See *Kaufman v. United States*, 394 U.S. 217, 225-226 (1969); *Brown v. Allen*, 344 U.S. 443, 508-509 (1953) (opinion of Mr. Justice Frankfurter); *Desist v. United States*, 394 U.S. 244, 262-263 (1969) (Mr. Justice Harlan dissenting); *Developments — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1040 (1970).

²⁶In 28 U.S.C. § 2254, Congress has provided for review of constitutional and federal law claims as a matter of right. Nothing in § 2254 or its history suggests any qualification of that right.

While review is available in this Court on a writ of certiorari following direct appeal to the highest state court, that review is exceedingly discretionary. Moreover, it has been frequently recognized that practical limitations make it impossible for this Court to bear the burden of being the first and last federal forum to oversee the enforcement of constitutional and other federal rights in state cases. See, e.g., *Developments — Federal Habeas Corpus*, *supra*, at 1061. Among the points that appear to have been decisive in Congress' judgment not to cut back federal habeas corpus jurisdiction was the conclusion that placing such a burden on this Court would greatly decrease the controlling and unifying force of federal court review of state court enforcement of federal rights. See 114 Cong. Rec. 11747. Federal habeas courts were aptly described during the Congressional debate over Title II of the Act as "sitting as delegates or masters for the Supreme Court." 114 Cong. Rec. 12834.

To the extent that *Davis* acts as a gatekeeper for relitigation of federal claims that had or could have been considered by a federal court, it reflects very practical concerns that the "writ of *habeas corpus* not be allowed to do service for an appeal." Because of the myriad federal statutory rights that apply in federal criminal cases, it is necessary to cull out those relatively few occasions where Congress could reasonably have intended to provide a right of litigation. By contrast, the occasion when a federal statutory right will affect the course of a state criminal case will be exceedingly rare.²⁷ It is fair to assume that only the most compelling federal interests would give rise to the enactment by Congress of statutory controls on state criminal cases. Title III is a good example of the type of interests and fundamental Congressional power that would be involved. It follows that, with so great a federal stake in such laws and their proper enforcement, Congress would intend their necessary and unqualified inclusion under § 2254 to ensure effective federal court supervision. Again Title III is in point, since it was enacted not only to protect the fundamental right of privacy, but also to provide a uniform and unifying codification of wiretap safeguards to take the place of disparate or nonexistent state regulations. See S. Rep. No. 1097, pp. 2153, 2156.²⁸ Plainly, Congress intended that such legislation would have the responsive and unifying

²⁷Comment, 88 Harv. L. Rev. 213, 218 (1974). Bator, Shapiro, Miskin & Wechsler, *Hart and Wechsler's The Federal Courts and The Federal System* (1977 Supp.), p. 267. The most common example of federal habeas review of nonconstitutional claims by state prisoners has been in the enforcement of federal extradition rights. See, e.g., 18 U.S.C. § 3182.

²⁸See also Statement of Congressional Findings, *supra*, Pub. L. 90-351, § 801(a).

enforcement that only an unqualified right to habeas review in the federal courts can assure. See generally, *Developments — Federal Habeas Corpus, supra*.

III. ASSUMING ARGUENDO THAT DAVIS v. UNITED STATES EXTENDS TO CASES BROUGHT UNDER 28 U.S.C. § 2254, THE COURT BELOW MISAPPLIED DAVIS TO BAR REVIEW OF THE FOURTH AMENDMENT AND TITLE III CLAIMS ASSERTED IN THIS CASE.

A. *Davis does Not Apply to a Case Involving Title III Claims.*

Because of the preemptive character of Title III, because of the important purposes served by its uniform code of safeguards and its suppression remedy, and especially because Congress has mandated strict enforcement of the Act, there exist in cases raising Title III claims "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). In refusing to find such "exceptional circumstances" here, the decision below is in direct conflict with the decisions of the Third Circuit in *United States v. Iannelli*, 528 F. 2d 1290 (1976); District of Columbia Circuit in *United States v. Vecchiarello*, 536 F. 2d 420 (1976); and the Second Circuit in *Langella v. Com'r of Corrections*, 545 F. 2d 818 (1976).

Congress created the Title III suppression rule in the image, at least for the purposes of the right to review under 28 U.S.C. § 2254, of the judicial suppression rule as it operated under the then present search and seizure law. That law, which Congress incorporated into Title III's suppression rule, contained no *Davis* limitations on the

availability of § 2254 for review of *Berger-Katz* claims. That law remains, by Congressional mandate, the law of Title III, and any attempt to excise it would substantially disrupt and impair the enforcement scheme Congress constructed, and, in any event, would be beyond the proper scope of judicial power.

B. *Davis does Not Apply to the Fourth Amendment and Title III Claims Raised in this Case.*

There is no doubt that the warrant, failing to set and specify time limits, as required by § 2518(4)(e) and (5) of the Act, is "insufficient on its face" under § 2518(10)(a)(ii) and the evidence obtained as a result is subject to suppression under § 2515 of the Act. The violation charged is not of some technical or tangential provision of the Act. Rather, this is a violation of the highest magnitude. The time limit requirements are not only at the very center of the constellation of wiretap safeguards Title III prescribes to limit wiretap use "to 'the most precise and discriminate circumstances,'" *United States v. Donovan, supra*, at 673, n. 25, but they are also a restatement of Fourth Amendment commands given by *Berger* and *Katz*. See *United States v. Lamonge*, 458 F. 2d 197 (6th Cir. 1972); S. Rep. No. 1097, p. 2190.

Davis, by its own terms, applies only where there is a "technical error" of procedure. 417 U.S. at 346. There is no conceivable justification for terming the Fourth Amendment and Title III violation committed in this case a "technical error." Consequently, no showing of "prejudice" can be required.

It should also be noted that in requiring a showing of "prejudice" the court below did not simply erect a

procedural barrier to the exercise of habeas jurisdiction. The real consequence of that decision was impermissibly to alter the substantive nature of the rights involved. For neither the Fourth Amendment nor Title III defines the right to time limits or conditions its enforcement on a showing of "prejudice." See *Berger v. New York*, *supra*; *Katz v. United States*, *supra*; and *United States v. Giordano*, *supra*, at 523, and n. 12. Where the constitution and Congress expressly decree a right that requires no showing of prejudice for its enforcement, the courts may not amend the substantive composition of the right through actions labeled "procedural."

Refusal by the court below to review petitioner's Fourth Amendment and Title III claims directly conflicts with the decisions in the District of Columbia, Second and Third Circuits noted above, see *supra*, at 28.¹⁹

C. The Court Below Erred in Not Finding Petitioner Sufficiently "Prejudiced" to Warrant Affording him a Federal Forum for his Fourth Amendment and Title III Claims.

Even assuming federal habeas corpus review can be conditioned on a showing of "prejudice," it is clear that under the circumstances of this case an ample showing of

¹⁹The decision below also conflicts with the decision of the Seventh Circuit in *United States ex rel. Machi v. U.S. Dept. of Prob. & Par.*, 536 F. 2d 179 (1976), extending habeas corpus review under § 2255 to a claim based on § 2516(1) of the Act. No *Davis* bar was perceived by the court to prevent reaching this claim. While the court applied *Davis* to another apparent Title III claim, it is obvious that the court regarded that issue as substantively frivolous and could for that reason have dismissed it outright.

prejudice has been made and the court below erred in not so finding.

The court below held that petitioner was not "prejudiced" by the absence of "the 30-day limit" in the May 10, 1972, wiretap order, as required by § 2518(5) of the Act.²⁰ But the absence of this limit is not at issue in this case. The critical failures challenged here²¹ were the state court's failure to make a determination of how many operating days were "necessary" given the nature and facts of this case, and its failure to set and specify such determination of the necessary operating time limits in the order. The obligation to make this determination is imposed by the first sentence of § 2518(5), and to specify that determination by § 2518(4).

The court's characterization of the failure as a "stenographic error" and not one of substance demonstrates a fundamental misconception of the nature of the violation and its consequences. While the "30-day limit" may be regarded as a "boilerplate" provision whose stenographic omission from the order is inconsequential, the same is definitely not true of the failure to set and specify the operating time. The "30-day limit" instruction applies to all cases and does not reflect a deliberated judgment of the court based on the nature and facts of the given case. But just such a judgment is required in setting operating time limits on the wiretap in compliance with the standard of "necessity."

²⁰"The 30-day limit" is one element of the general instruction every warrant must contain that "authority to intercept . . . must terminate upon attainment of the authorized objective, or in any event in 30 days."

²¹The absence of all required time limits constitutes a massive violation of the time limit specification requirements imposed by Title III and the Massachusetts law it incorporates. But the failure of chief consequence involves the absence of the operating time limits.

To suggest that the error was stenographic is to presume unreasonably that the state court necessarily granted the operating time the prosecutor requested.³² In fact, there is no evidence of what the court determined regarding operating time limits. There is every possibility that under the circumstances in this case the court, had it made the required determination and specified it, would have restricted the operating time to a substantially shorter period than the maximum period requested by the prosecutor. This was a second tap directed at petitioner, it was installed on telephones located in a private home, the earlier tap had intercepted hundreds of phone calls, some entirely private having no import to the criminal investigation, and the request was for the maximum operating time in a case that could hardly be termed extremely serious or difficult to investigate. Other factors — including the court's experience, the Congressional demand for restraint in using even lawful wiretaps, and the judge's intuitive assessment of the realities and personalities involved — might have further reduced the operating time the court would find necessary. In short, petitioner's rights were severely prejudiced because the tap's operating time might or would have been reduced had the state court complied with the Fourth Amendment and Title III.³³

³² The stenographic failure to specify the proposed operating time was made in the prosecutor's office, not the judge's. While the prosecutor drafted the order, it remained nothing more than a "proposal" repeating various requests made in the application.

³³ The prosecutor obviously viewed the state court to be a rubber stamp, since he apparently never read the order after it was signed to ascertain the time limits. Both the Fourth Amendment and Title III require wiretap orders to specify the judge's findings as a means of controlling the prosecution. Obviously, this objective is defeated if the prosecutor does not read the order. The failing then was not by the prosecutor's secretary or his proofreading, but by his wanton disregard of the warrant process, which left him free to invade privacy as he saw

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 9, 1977.

fit. The prosecutor's actions cannot be condoned on the assumption that if he or she goes too far suppression is always an available remedy. For that would be contrary to the basic philosophy behind both the Fourth Amendment and Title III, which is to prevent violations, not repair them. In this case, had the prosecutor read the order he would have discovered the absence of time limits and then could have called the problem to the court's attention for immediate rectification. Since the prosecutor had the opportunity to cure the defect and failed to use it because of his indifference to the court's process, the Commonwealth should be estopped from claiming innocent mistake and from asserting an objection to suppression. Cf. *United States v. Pennsylvania Chem. Corp.*, 411 U.S. 655, 674 (1973).

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Appendix.

**United States Court of Appeals
for the First Circuit**

No. 76-1207

FRANCIS A. VITELLO,
PETITIONER, APPELLEE,

v.

CHARLES GAUGHAN, ETC.,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. FRANK H. FREEDMAN, *U. S. District Judge*)
[414 F. Supp. 26]

Before COFFIN, *Chief Judge*,
ALDRICH AND CAMPBELL, *Circuit Judges*.

Barbara A. H. Smith, Assistant Attorney General, Criminal Division, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellant.

Thomas J. Carey, Jr., on brief for Massachusetts District Attorneys Association, amicus curiae.

Francis J. DiMento, with whom *James J. Sullivan, Jr.*, *Philip T. Tierney*, and *DiMento & Sullivan* were on brief, for appellee.

November 8, 1976

ALDRICH, *Senior Circuit Judge*. Petitioner for habeas corpus finds himself in state prison as a result of evidence acquired by a wiretap authorized by a warrant which failed to contain the 30-day limit required by the Omnibus Crime

Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(5). The application for the warrant contained the limitation, but, by secretarial negligence, none was included in the warrant itself. In point of fact, the evidence was acquired in 12 days. On appeal, the Massachusetts court sustained the conviction, *Commonwealth v. Vitello*, Mass. Adv. Sh. (1975) 769, 327 N.E. 2d 819, holding that the warrant must be read in conjunction with the application, and that, alternatively, petitioner had no complaint in the absence of prejudice. Petitioner takes the position that, under federal law, since the warrant contains no reference to the application, it must be read on its face, and hence it, and its fruits, are to be treated as void.

While the habeas corpus statute authorizes issuance of the writ to those who are in state custody "in violation of the Constitution¹ or laws . . . of the United States," 28 U.S.C. § 2254 (emphasis suppl.), it has never been thought that every error of law in a criminal trial warrants issuance of the writ. See, e.g., *Davis v. United States*, 1974, 417 U.S. 333. Indeed, even a constitutional violation will not call for habeas corpus relief where the petitioner was not harmed by the error. E.g., *Booton v. Hanauer*, 1 Cir., (9/2/76) F. 2d. ; *Subilosky v. Moore*, 1 Cir., 1971, 443 F. 2d 334, cert. denied, 404 U.S. 958. We hold that whether or not the state court erred, as a matter of federal law, in reading the warrant and application together,² petitioner is not entitled to release since the error, if any, was not prejudicial.

¹ The district court held petitioner's custody to be in violation of the Constitution, a ruling that petitioner concedes cannot stand in view of the Court's subsequent decision in *Stone v. Powell*, (7/6/76) — U.S. —, holding that habeas corpus relief is not to be afforded for Fourth Amendment claims already litigated in state criminal proceedings.

² Petitioner cites as allegedly contrary authority, *Moore v. United States*, D.C.Cir., 1972, 461 F.2d 1236; *United States v. Meeks*, 6 Cir., 1963, 313 F.2d 464; *United States v. Ortiz*, D.Colo., 1970, 311 F.Supp. 880, aff'd 445 F.2d 1100, cert. denied, 404 U.S. 993.

As the Court said in *Davis v. United States*, ante, at 346, quoting *Hill v. United States*, 1962, 368 U.S. 424, 428, in determining whether an alleged nonconstitutional error is cognizable on collateral review,

"the appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

Though *Davis* involved section 2255, we think the test the Court set forth for determining whether an alleged violation of federal law warrants habeas corpus relief is equally applicable to section 2254. See *Hill v. United States*, ante, at 428 n.5, *semble*.

It being apparent that no prejudice resulted from the inadvertent omission of a termination date from the warrant, petitioner argues that prejudice need not be shown, and that *Davis* is distinguishable because it did not involve an exclusionary rule. We are not persuaded by petitioner's cases allegedly supporting the proposition that prejudice is irrelevant; counsel fails to note that all of them involve direct, not collateral review, a distinction often pointed out. See, e.g., *Atwell v. Arkansas*, 8 Cir., 1970, 426 F. 2d 912, 915. Alternatively, petitioner urges that this is a special case because of Congress' announced concern over unjustified and excessive wiretapping. See Omnibus Crime Control and Safe Streets Act of 1968 § 801, 82 Stat. 211. Granted that Congress was interested in deterrence, see S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Admin. News at 2185, clearly it was concerned with substantive excesses, not stenographic error. The fruit of such error should not be a windfall for petitioner.

Reversed; petition dismissed.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1207.

FRANCIS A. VITELLO,
PETITIONER, APPELLEE,

v.

CHARLES GAUGHAN, ETC.,
RESPONDENT, APPELLANT.

JUDGMENT.

Entered November 8, 1976.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the cause is remanded with directions to dismiss the petition.

By the Court:

DANA H. GALLUP,
Clerk.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANCIS A. VITELLO

v.

CIVIL ACTION
No. 75-3077-F

CHARLES GAUGHAN, as he is
Superintendent of the
Massachusetts Correctional
Institution, Bridgewater

Memorandum and Order.

April 9, 1976.

FREEDMAN, D.J.

This matter is before the Court on a petition for writ of habeas corpus. Petitioner Francis A. Vitello was convicted of various violations of the gambling laws of the Commonwealth and sentenced to prison. These convictions were upheld by the Supreme Judicial Court, *Commonwealth v. Vitello*, 1975 Mass. Adv. Shts. 769, 327 N.E. 2d 819. Vitello bases his present attack upon a narrow aspect of one of the two wiretap warrants used in the prosecution of the case.

The facts necessary for a determination of the issue can be briefly stated.¹ On May 10, 1972, a state judge issued a warrant authorizing certain telephone wiretaps for use in the gambling investigation which resulted in petitioner's challenged conviction. The warrant was defective on its face as it did not contain a termination date for the wiretap interceptions as required by 18 U.S.C. § 2518(4)(e) and the Fourth and Fourteenth Amendments. The application for the warrant, however, did include such a termination date. The parties agree that the only issue before the Court is whether the application may be read with the warrant to supply the necessary termination date or whether the warrant must stand alone and thus fail. See *Berger v. New York*, 388 U.S. 41 (1967).

The thrust of petitioner's argument is that there must be some affirmative reason to permit a reviewing court to rely upon the application to uphold a facially defective warrant. Reference to the application would be permitted, he argues, if there were an ambiguity on the face of the warrant, or if the application were incorporated by reference, or if the application had been physically attached to the warrant. None of these exceptions is available in the instant case; and thus, petitioner contends, the warrant cannot be saved.

Vitello relies upon *United States v. Lamonge*, 458 F. 2d 197 (6th Cir.), *cert. denied*, 409 U.S. 863 (1972), as support for his position. While *Lamonge* was concerned with a facially invalid warrant, the means the prosecution used in attempting to cure it were quite different from those used in this case. There the prosecutor attempted to amend the warrant by motion at trial. No attempt was made to read the warrant with the application — the procedure advocated here. Apparently petitioner cites *Lamonge* for the

¹A more exhaustive statement of the facts may be found in the Supreme Judicial Court opinion, *Commonwealth v. Vitello*, *supra*.

proposition that a facially invalid warrant cannot be saved. Plainly, this is not the law, *see, e.g., United States v. Tortorello*, 480 F. 2d 764 (2nd Cir.), *cert. denied*, 414 U.S. 866 (1973), (affidavits specifically incorporated into wiretap orders). The narrow question for this Court is whether there is some factor in this case which would permit the application to be read with the warrant. *Lamonge* does not address this issue.

Another of the cases cited by petitioner, however, is persuasive authority for his position. In *Moore v. United States*, 461 F. 2d 1236 (D.C. Cir. 1972), the court in upholding a warrant, defined those circumstances in which the affidavit is to be read with the warrant:

There is a fundamental distinction between the warrant and the underlying affidavit, and the affidavit is not necessarily either part of the warrant or available for defining the scope of the warrant.

However, the warrant may properly be construed with reference to an affidavit for purposes of sustaining the particularity of the premises to be searched, provided (1) the affidavit accompanies the warrant, and in addition (2) the warrant uses "suitable words of reference" which incorporate the affidavit by reference. (Footnote and citations omitted.) *Id.* at 1238

The *Moore* court's formula for determining when the supporting papers can be read with a warrant does not seem to include a situation such as the one in this case where no reference to the application or physical attachment of the application is present. See, also, *United States v. Ortiz*, 311 F. Supp. 880, 883 (D. Colo. 1970), *aff'd*. 445

F. 2d 1100 (10th Cir.), *cert. denied*, 404 U.S. 993 (1971), and *United States v. Meeks*, 313 F. 2d 464, 466 (6th Cir. 1963).

As petitioner carefully documents in his memorandum the reasoning of the Commonwealth's principal authority, *United States v. Manfredi*, 488 F. 2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), cannot bear close scrutiny. That case seems to stand for the principal that even in the absence of the special circumstances outlined above an affidavit may nevertheless be read with a warrant to supply the necessary elements. *Manfredi* relied upon *United States v. Tortorello*, *supra*, as supporting this proposition. *Tortorello* cannot be extended that far, however, since the warrant in that case specifically incorporated the affidavit. The bald assertion in *Manfredi* that supporting papers may be used to validate a warrant appears to be unsupported in prior case law.² Accordingly, I am persuaded that petitioner is entitled to prevail on this issue.

The alternative ground advanced by the Commonwealth for upholding the warrant is that the police officer upon whose affidavit the assistant district attorney based his application for the warrant participated in the execution of the warrant. Thus, respondent argues, the information contained in the supporting papers may be imputed to the officer and the missing termination date thereby supplied. The authority for this assertion is *Commonwealth v. Todisco*, 1973 Mass. Adv. Shts. 613, 294 N.E. 2d 860.

²It may also be that *Manfredi* is factually distinguished since it was the minimization requirement that was omitted from the order, not the termination date as in this case. Some courts do not regard the absence of minimization instructions as substantial, *see, e.g., United States v. Baynes*, 400 F. Supp. 285, 309 (E.D. Pa. 1975). [West Publishing Co. has cited this case as affirmed without opinion, 517 F. 2d 1399. This is incorrect; no final action has yet been taken in this case by the Third Circuit.]

Petitioner contends that *Todisco* should not be followed because it was wrongly decided and that, in any event, this Court is not bound by it. I do not reach these contentions because it is clear that the facts of this case are distinguishable from those of *Todisco*. In *Todisco* there was simply an affidavit and a search warrant. The affiant executed the warrant and when faced with an ambiguity was able to resolve it based upon the facts in the affidavit. In the instant case the termination date which respondent seeks to have the Court read into the warrant is contained in the *application* of the assistant district attorney, not in the police officer's *affidavit*. To permit an incorporation of the application in this case would amount to an extension of *Todisco* justified neither by the cited authority nor by reference to Fourth Amendment principles. The oft-cited line from *United States v. Ventresca*, 380 U.S. 102, 108 (1965) that "... affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.", is inapposite in this context and cannot correct the otherwise invalid warrant.

For the foregoing reasons the Court finds the May 10, 1972, warrant to be constitutionally defective. The writ of habeas corpus shall issue unless within ninety (90) days from the date this Order becomes final the Commonwealth shall have begun proceedings to retry the petitioner.

FRANK H. FREEDMAN,
United States District Judge.

Constitution of the United States.

The Fourth Amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Omnibus Crime Control and Safe Streets Act of 1968.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides in pertinent part:

§ 2515. [Prohibition of use as evidence of intercepted wire or oral communications.]

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. [Authorization for interception of wire or oral communications.]

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2518. [Procedure for interception of wire or oral communications.]

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon

attainment of the authorized objective, or in any event in thirty days.

(10) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

United States Code, Title 28.

Sections 2241 and 2254 of 28 U.S.C. provide in pertinent part:

§ 2241. [Power to grant writ.]

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application of hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . .

§ 2254. [State custody; remedies in Federal courts.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Massachusetts General Laws, Chapter 272.

Section 99 of Massachusetts General Laws, Chapter 272, provides in pertinent part:

[Eavesdropping, Wire Tapping, and Other Interception of Communications.]

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception or oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS:

SUPERIOR COURT

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS:

GREETING:

Whereas, application in writing under oath, supported by Affidavits, has been made before me this day, the subscriber hereto, REUBEN L. LURIE, a Justice of the Superior Court of the Commonwealth, for an order authorizing and directing the interception of wire communications pursuant to Mass. General Laws, Chapter 272, Section 99; complaining that two females, "MILLY" and "MARY", a more complete description being unknown to the Commonwealth at this time, who are now working at 28 Meyer Street, Roslindale section of the City of Boston and using two telephones located therein, 323-1012 and 327-5892, in order to violate Mass. General Laws, Chapter 271, Section 17 and to conspire to violate the same; have conducted, are conducting, and will continue to conduct from said 28 Meyer Street, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization to engage in supplying illegal goods and services, namely; violation of Section 17, Mass. General Laws, Chapter 271, contrary to the laws of this Commonwealth, and that they communicate by means of the telephones between and among themselves in furtherance of such conspiracy, that these communications are made by

MARY and MILLY to FRED VITELLO, to a Wire Service and to diverse individuals named in the attached Affidavits and amongst and between any or all of them, and any other person or persons unknown concerning unlawful Gaming by means of the telephone instruments located on the above described premises at 28 Meyer Street, and that said instruments 323-1012 and 327-5892 are of this date both listed to WILLIAM P. WEST as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said MILLY and MARY and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful Gaming and violations of Section 17 of Mass. General Laws, Chapter 271, and conspire to violate the same.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, Mass. General Laws, as Amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of WILLIAM P. WEST, located at 28 Meyers Street, Roslindale section of Boston, Massachusetts, and to tap and make connection with any and all wires leading to the telephone instruments as of this date numbered 323-1012 and 327-5892, with a purpose to obtain evidence of the unlawful activities of MARY, MILLY, FRED VITELLO, FRANK VITELLO and other persons as described in the Affidavit submitted with said application and a person or persons unknown at this time concerning Unlawful Gaming and violations of Section 17, Mass. General Laws, Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such inter-

ception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein because the Application alleges, and it is found as a fact that good cause, special important facts, and exigent circumstances exist to require the postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

You are therefore authorized and directed with all necessary assistants to install leased lines for the interception of said wire communications. The leased lines used in the execution of this warrant is to consist of a private telephone line installed at a place designated by ROBERT SNIDER, specially designated Assistant District Attorney. The leased line is to be supplied by the New England Telephone & Telegraph Co. pursuant to this order and warrant.

WITNESS, my hand and seal on this date of issuance the 10th day of May, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.